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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

87

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAR 25 2011

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation, operates a retail furniture store. It claims to be a subsidiary of Al-Hilal Sweets & General Store, located in Karachi, Pakistan. The beneficiary was previously granted L-1A status for a one-year period in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity under the extended petition.

The petitioner subsequently filed an appeal.¹ The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, asserts that the director's decision contains errors of fact and a misapplication of the law to the facts of the case. Counsel addresses the disputed facts and asserts that the petitioner's business is of an adequate size to allow the beneficiary to primarily supervise subordinate professionals and managers who oversee the employees providing the day-to-day services of the company. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

¹ The petitioner also filed a motion to reconsider on April 21, 2009, simultaneously with the instant appeal. In a decision dated June 10, 2009, the director granted the motion and affirmed his previous decision to deny the petition.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;

- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 2, 2009. The petitioner indicated on Form I-129 that the U.S. company has seven employees.

The petitioner submitted a letter dated January 20, 2009, in which it described the beneficiary's duties as follows:

As President of our company, [the beneficiary] has begun business operations under the name of Affordable Furniture South Loop. In his capacity as President he is responsible for core decisions in regard to policy making and guidelines to operate the corporation. He has set up a management and sales personnel that implement the company policies and guidelines to operate a profitable business.

He works at the top of the company hierarchy and has wide discretionary powers over the management/decision making aspects of the operation such as formulating policy,

directing and coordinating the activities of management staff and employees. He is responsible for managing the expansion of our company into new markets. The key to [the petitioner's] success depends on its ability to open and expand into new markets.

* * *

[The beneficiary] is an essential employee for the purpose of business development as he oversees all the initiatives of the company. He is responsible for managing the company which involves the hiring and training of employees. He is responsible for overseeing to the day-to-day operations of our business.

The petitioner submitted an organizational chart which depicts the position of president as directly supervising an operations manager, who in turn supervises a warehouse manager and a store manager. The chart indicates that two salesmen report to the store manager while a loader/driver and inventory clerk report to the warehouse manager. Finally, the chart depicts an independent CPA and lawyers who report to the president. None of the employees were identified by name on the chart.

The petitioner provided a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, and Texas state quarterly report for the third quarter of 2008, which indicates that the company had seven employees as of October 2008.

On February 13, 2009, the director issued a request for additional evidence ("RFE"), in which he instructed the petitioner to submit the following: (1) a comprehensive description of the beneficiary's duties; (2) a complete position description for all employees in the United States, including a breakdown of the number of hours devoted to each employees' job duties on a weekly basis; (3) copies of educational credentials for the beneficiary's subordinates; (4) the petitioner's IRS Form 941 for the fourth quarter of 2008; and (5) copies of the petitioner's IRS Forms 1099, W-2 and W-3 for 2008.

In response, the petitioner submitted a lengthy position description for the beneficiary, noting that he is "responsible for core decision policy making on behalf of the corporation," with discretionary authority over areas such as hiring and firing, setting wages and raises, contract and lease negotiations, choosing business locations, budget expenditures, and company policies and guidelines. The petitioner further stated that the beneficiary "meets the criteria of manager by the fact he supervises a subordinate manager who in turns supervises subordinate employees as well as managing major components and functions of the company." The petitioner stated that the beneficiary "does not engage in the daily activities of the retail business" but instead performs the following duties:

10% of time

Oversees the management/decision making aspects of the operation such as formulating policy, directing and coordinating the activities of the management staff and employees; In consultation with the parent company in Pakistan, develops long range goals and objectives in the exploring similar and diversified investments in the U.S.

40% of time

- Responsibilities including defining the objectives of the company and directing the overall operations of the U.S. Company;
- Responsible for initiating and implementing expansion plans for the company;
- Plans, develops and establishes strategic goals for [the petitioner's] employees to follow such as directing and coordinating the activities of the operations manager and employees in the operations, purchasing and marketing for which responsibility is delegated to further attainment of goals and objectives; Review and revise company's policies, manuals and procedures as changes are warranted;
- Directs, plans, and implements policies, objectives and activities of [the petitioner] in order to ensure continuing operations, to maximize returns on investments and increasing productivity;
- Directs staff members in operational issues of running furniture store;
- Reviews reports from operational manager which analyzes activities costs, operations and forecast data to determine progress toward stated goals and objectives;
- Directs the business development by reviewing and revising reports prepared by the operations manager detailing operations of competing organizations, details of sales promotions, inventory controls and cost reduction method.

30% of time

- Responsible for corporate planning, overseeing general administration, marketing, sales, and purchasing activities for the retail business;
- Offers strategic guidance to management and employees in achieving sales goals and objectives of the company; Overseas [sic] the organization and implementation of sales promotions, merchandise selection and formulation methods of cost containment.
- Approves company budget and investment projects for expansion and diversification such as retail trade and investment; Reviews activity reports and financial statements of operations to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions such as determining areas needing cost reduction;

20% of time

- Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity of all business operations;
- Oversees hiring and firing of employees, controls their assignments through managers;
- Supervises the management staff as they carry out their duties and responsibilities and reviews their performance;

- Manages the Operations manager who in turn has authority over the store employees and subordinate staff;
- Supervises financial accounting responsibilities and responsible for hiring independent CPA for filing company's tax returns;

In addition, [the beneficiary] is responsible for managing the expansion of our company into new markets. . . . [T]he beneficiary manages the business development and financial functions of our company by consulting with qualified CPA and Business Broker and Consultant to review proposals for acquiring new businesses. He also directs the business development by reviewing reports from the operations manager on competing organizations, sales programs, and management of the retail store and by overseeing inventory controls and cost reduction methods.

The petitioner provided position descriptions for the beneficiary's subordinates. The petitioner stated that the operations manager, [REDACTED], devotes 50 percent of his time to inventory control programs, analyzing sales reports, directing product simplification and standardization, coordinating the sales activities of store employees, developing pricing strategies, and delegating authority to subordinate employees. The petitioner indicates that the remainder of his time is allocated to the following tasks: delegating authority to subordinate managers; directing training and performance evaluation and coordinating activities of subordinate managerial personnel and employees; interviewing and selecting individuals for managerial and other positions; handling employee time off and vacation requests; implementing company policies and procedures through subordinate managers; implementing practices to handle employee grievances and customer complaints; preparing customer complaints or employee incident reports; preparing monthly federal tax deposits; preparing quarterly payroll tax report for submission to accountant; and meeting daily with the president. The petitioner stated that this position requires a Bachelor's degree.

The petitioner stated that [REDACTED] serves as "Floor Manager/Warehouse Manager" and is responsible for supervising and coordinating the activities in the store, interviewing job applicants, evaluating worker performance, scheduling and assigning duties to workers, training workers, assisting with difficult sales, and approving checks. The petitioner further indicated that [REDACTED] spends the remaining 50% of his time ordering merchandise and supplies, recording delivery of merchandise, preparing sales and inventory reports, examining returned merchandise and resolving customer complaints; planning merchandise layout, inventorying and requisitioning new stock, and maintaining sales reports.

The remaining employees include two salespersons, a delivery driver, and two delivery helpers/inventory clerks.

The petitioner submitted the requested copies of its IRS Forms W-2, Wage and Tax Statement, for 2008, which show that the beneficiary and the operations manager each earned \$30,000; the floor

manager/warehouse manager earned \$7,102.21; the delivery driver earned \$7,468; the delivery helpers/inventory clerks earned \$11,000 and \$8,071, and no wages were paid to the two salespersons.

The director denied the petition on March 20, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director noted that only two or three of the petitioner's employees appear to work on a full-time basis, and observed that the record did not contain evidence of wages paid to the two salespersons. The director acknowledged the petitioner's claim that the beneficiary's direct subordinate, the operations manager, has a bachelor's degree, but emphasized that the petitioner did not provide evidence documenting that the employee has a degree or that the position requires one, such that it could be concluded that the beneficiary manages a subordinate staff of professionals.

The director acknowledged the position description provided for the beneficiary, but found that the duties outlined identify general managerial functions and do not identify the specific tasks he performs as a manager or executive.

The director noted that, since the petitioner does not appear to employ any full-time salespersons, it seems likely that the beneficiary and his subordinates would be engaged in providing the sales and services of the organization. The director concluded that, given the size and nature of the business, it is more likely than not that the beneficiary and his subordinate employees will primarily perform the tasks necessary to operate the business.

On appeal, counsel for the petitioner asserts that the director did not accurately analyze the wage information provided for the petitioner's employees, noting that in 2008, the company had three employees working 40 hours per week, three employees working 30 hours per week, and two employees working 20 to 25 hours per week.² Counsel contends that "when a proper analysis of full-time employees is performed it is evident that the petitioner does have ample staff to support the fact that the subordinate employees and not the beneficiary perform the day-to-day tasks of the company."

Counsel further contends that the director erred by stating that "it is not known" if a Bachelor's degree is required for the position of operations manager. Counsel states that the petitioner clearly indicated that a degree is required for the position.

Counsel acknowledges the director's observation that the job description provided for the beneficiary identifies "general managerial functions," but emphasizes that, as a company with seven to eight employees, "it is quite feasible that the Petitioner's business of adequate size which allows the beneficiary to act in a managerial capacity while the subordinate professionals and managers oversee a subordinate staff which is more than capable to provide the services and products of the company so the beneficiary does not have to engage in non-qualifying duties." Counsel indicates that the petitioner has attached a

² Counsel indicates that [REDACTED] was the petitioner's floor manager in 2008 and earned full-time wages of \$11,000, but now works as an inventory/warehouse clerk.

more detailed description of how the beneficiary manages his staff, but the AAO notes that the petitioner has re-submitted the job descriptions for the beneficiary and his subordinates that were previously submitted in response to the RFE.

Finally, the petitioner submits a copy of the petitioner's Texas state quarterly wage report for the first quarter of 2009, which reflects wages paid to eight employees. Counsel notes that the petitioner intends to open a second store that will employ an additional 7 to 8 employees by the end of the second quarter of 2009.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(I)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

As noted by the director, the petitioner has provided a lengthy, yet vague, position description that fails to provide any insight into the beneficiary's day-to-day job duties. The duties that comprise approximately half of the beneficiary's time essentially paraphrase the statutory definitions of managerial and executive capacity. For example, the petitioner states that the beneficiary spends 10 percent of his time "overseeing the management of the company," "formulating policy," and developing "long range goals and objectives," and an additional 40 percent of his time "defining the objectives of the company and directing the overall operations of the U.S. Company," "initiating and implementing expansion plans," planning developing and establishing strategic goals, reviewing and revising company policies, and directing, planning and implementing policies and objectives. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

These duties, to which the petitioner indicates the beneficiary devotes fully half of his time, fail to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. at 1108. Furthermore, although the petitioner provided a breakdown of the beneficiary's duties, it did not identify the amount of time the beneficiary devotes to specific tasks. The remainder of the beneficiary's

job description is similarly vague and repetitive, and includes primarily planning, financial management and personnel management duties. For example, the petitioner indicates that the beneficiary is "responsible for corporate planning, overseeing general administration, marketing, sales and purchasing activities," "reviewing activity reports and financial statements of operations," "revising objectives and plans" and supervising the management staff.

In addition, although the petitioner indicates that the beneficiary will be managing the marketing, business development, expansion, administration and financial activities of the business, the petitioner has not identified which, if any, of the beneficiary's subordinates perform non-managerial duties associated with these functions. The petitioner does not claim to employ administrative or financial support personnel, such as a bookkeeper, secretary, or office assistant. The petitioner indicates that the beneficiary "manages the business development and financial functions of our company by consulting with a qualified CPA and Business Broker and Consultant to review proposals for acquiring new businesses." However, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Therefore, while the beneficiary in this matter evidently exercises discretion over the U.S. business as its president, the petitioner must still establish that his actual job duties are primarily managerial or executive in nature. The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Rather than attempting to clarify the beneficiary's job duties on appeal, counsel asserts that "it is quite feasible that the Petitioner's business of adequate size which allows the beneficiary to act in a managerial capacity while the subordinate professionals and managers oversee a subordinate staff which is more than capable to provide the services and products of the company so the beneficiary does not have to engage in non-qualifying duties." Counsel's claim that it is "feasible" that the beneficiary is relieved from performing non-qualifying duties cannot be accepted in lieu of the required specific description of his duties. While many of the broad duties described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial capacity of a beneficiary, including the beneficiary's duties, the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Here, the petitioner claimed at the time of filing that it employs seven employees. The petitioner's organizational chart submitted at the time of filing identified a total of eight positions, including a president, operations manager, store manager, warehouse manager, two salespersons, a loader/driver and an inventory clerk, arranged in a four-tier hierarchy. In response to the RFE, the petitioner indicated that its employees include a president, operations manager, floor/warehouse manager, two salespeople, a delivery driver and two delivery helpers/inventory clerks.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The beneficiary's direct subordinate is an operations manager, who in turn supervises all other employees of the company. The petitioner indicates that this position requires a Bachelor's degree, and provided evidence that [REDACTED] has a Master of Business Administration degree. Upon review, the petitioner provided sufficient evidence to establish that the operations manager holds a supervisory position. However, it cannot be determined based on the beneficiary's job description how much time the beneficiary devotes to personnel management responsibilities. The petitioner indicated that the beneficiary devotes a total of 20 percent of his time to five duties which include overseeing the hiring and firing of employees, supervising "management staff," and managing the operations manager. Based on this information, the AAO cannot conclude that the beneficiary is primarily a personnel manager. Therefore, while we do not doubt that the beneficiary has the authority to hire and fire subordinate personnel, the evidence of record is insufficient to establish that his primary duties involve the direction and control of a subordinate staff comprised of managerial, professional or supervisory personnel.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an

essential function, the petitioner must furnish a detailed job description clearly stating the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has neither claimed nor provided evidence that the beneficiary manages an essential function. Furthermore, as discussed above, the record does not support an affirmative determination that the beneficiary will perform primarily managerial duties.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The petitioner in this matter is a one-year-old company that operates a retail furniture store with nearly 10,000 square feet of warehouse and showroom space. It claims to employ the beneficiary as president, an operations manager, a floor/warehouse manager, two sales people, a driver, and two inventory clerks/delivery helpers. Given the nature of the business, it is reasonable to believe that it does not maintain standard business operating hours. Rather, it appears based on the photographs submitted that the business is open seven days per week. Given that the primary purpose of the business is to sell furniture, the AAO questions how the petitioner is able to meet this objective with only two sales personnel who may or may not be employed on a full-time basis, and who presumably do not work seven days per week.

Further, the petitioner claims that these two salespeople are supervised by three layers of management. The petitioner's evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. Here, one of the claimed supervisory

or managerial employees, the "floor manager/warehouse manager," earned a salary of \$3,482, less than all but two of his five claimed subordinates, during the quarter in which the petition was filed. The lack of sales personnel also raises questions as to whether the petitioner provided complete position descriptions for its managerial and supervisory staff, which are not claimed to participate in any day-to-day sales duties.

Furthermore, as discussed above, the petitioner indicates that the beneficiary manages the company's marketing, expansion, business development, administrative and financial activities, but has not identified who on its staff performs the non-managerial duties associated with these functions. Again, we acknowledge counsel's assertion that "it is quite feasible" that a business with seven to eight employees would employ a manager who is relieved from engaging in non-qualifying duties. However, such a determination must be made in light of the nature of the business being operated. The petitioner has not established how the company's seven employees would relieve the beneficiary from performing the non-managerial duties associated with the financial, administrative, marketing and business development aspects of operating a large retail furniture store.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel asserts on appeal that the petitioner intends to open a new 12,000 square foot location that will employ an additional seven to eight employees by the second quarters of 2009. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.